IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.*	**Petition for Mandamus.**

PETITION FOR MANDAMUS.

To the Honorable, the Supreme Court of the United States:

Your petitioners, The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, respectfully show to this Honorable Court:

That prior to the 10th of May, 1901, Alexander Rodgers was a wholesale dealer in seeds in Chicago, and on that day was adjudged a bankrupt by the District Court for the Northern District of Illinois, Northern Division (now Eastern Division), and the Chicago Title and Trust Company, was duly appointed

receiver, and subsequently trustee, of his estate, and is still acting as such trustee:

That the National Storage Company is a corporation engaged in conducting a warehousing business and that some months prior to said 10th of May it received into its possession certain seed and issued to said Rodgers warehouse receipts therefor; and immediately thereafter, and prior to said 10th of May, said Rodgers endorsed and hypothecated certain of said receipts to petitioner, The First National Bank of Chicago, and certain of said receipts to petitioners, H. W. Rogers & Brother, to secure loans made by them respectively to said Rodgers:

That on the 13th of May, 1901, said Trust Company as such receiver filed in said District Court its petition reciting that it had taken possession of said seed and asking the court's direction with respect to a sale thereof; that petitioners and said Storage Company appeared specially and objected to the jurisdiction of said court, but said court overruled said objection, and directed said seed to be sold and the proceeds to be held subject to the order of said court:

That thereupon petitioners severally filed in said court petitions asking the payment of their claims out of said proceeds, and thereafter said court entered a decree finding that said Storage Company was, when said petition in bankruptcy was filed, in the possession, and entitled to the possession, of said seed, and directing that the proceeds thereof (it having been sold by order of court) be paid to your petitioners:

That thereupon said trustee, and one James A. Patten, a creditor of said estate, severally perfected appeals from said order to the Circuit Court of Appeals

for the Seventh Circuit, which court decided that said Storage Company was not in possession of said seed when said proceedings in bankruptcy were commenced, and on that ground remanded said case to said District Court with directions to enter a decree for said Trustee:

That thereupon petitioners applied to this court for, and were granted, a *certiorari* to review said decision, and thereafter this court (198 U. S. Rep., at p. 280) decided that there was no right of appeal to said Circuit Court of Appeals, and reversed with directions to said Circuit Court of Appeals to dismiss said appeals and remand said cause to the District Court "for further proceedings in conformity with this opinion," and this court also stated that the decree of said District Court directing the return of said money to petitioners should have been without prejudice to the right of said respondents to litigate in the proper court, which modification this court directed to be made:

That a mandate was duly issued from this court to said Circuit Court of Appeals, and being filed therein on the 12th day of October, 1905, said court entered an order pursuant to said mandate dismissing said appeals and remanding said cause to said District Court for further proceedings in conformity with said opinion of this court, and issued to said District Court a mandate remanding said cause to said court for further proceedings as aforesaid, and said mandate, with a certified copy of this court's opinion, being filed in said District Court on the 1st of November, 1905, said court, the Honorable Solomon H. Bethea, District Judge, presiding, entered in said court an order in words and figures following:

"This cause coming on now to be heard upon the mandate of the United States Circuit Court of Appeals for the Seventh Circuit remanding said cause to this court for further proceedings in conformity with the opinion of the Supreme Court of the United States, and the court having inspected said mandate and the said opinion of the Supreme Court of the United States and it appearing therefrom that this court had jurisdiction to find as, in and by its decree heretofore entered herein on the 29th day of October, A. D. 1902, it did find, that the National Storage Company was at the time of the filing of the petition by the receiver herein, to-wit, on May 13, 1901, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession and had possession of the property in question described in said decree of October 29, 1902, but that by reason of such finding of possession in said National Storage Company this court was without jurisdiction to proceed to adjudicate upon the rights of said The First National Bank of Chicago, and H. W. Rogers and James C. Rogers, doing business as H. W. Rogers and Brother, to payment and satisfaction of their claims out of the proceeds of the sale of said property, but that said decree should in that respect and to that extent be modified. It is therefore ordered, adjudged and decreed by the court that the decree heretofore on the 29th day of October, 1902, entered herein be, and the same hereby is, modified and changed as follows:

The First National Bank of Chicago is permitted to retain so much of the moneys in its hands under and by virtue of the order entered herein on August 5, 1901, as are proceeds of property covered by the warehouse receipts of the National Storage Company held by said bank at the time of the filing of the petition herein, without accounting therefor in this cause and with liberty to account therefor as it may be advised, but at its own peril, and without prejudice to the rights of the Chicago Title and Trust Company, the trustee herein, if this court shall so authorize, to litigate in any proper court the question of the right of said

trustee to recover said funds as a part of the bankrupt's general estate.

And further said bank is ordered and directed to pay over to said H. W. Rogers and Brother so much of the moneys in its hands under and by virtue of the said order entered herein on August 5, 1901, as are proceeds of property covered by the warehouse receipts of the National Storage Company held by said H. W. Rogers and Brother at the time of the filing of the petition herein, to be received and held by said H. W. Rogers and Brother without accounting therefor in this cause and with liberty to account therefor as they may be advised, but at their own peril, and without prejudice to the rights of the Chicago Title and Trust Company, the trustee herein, if this court shall so authorize, to litigate in any proper court the question of the right of said trustee to recover said funds as a part of the bankrupt's general estate.

It is further ordered, adjudged and decreed that the said former decree of October 29, 1902, except as hereinabove modified, shall stand and remain in all respects in full force and effect."

That thereafter said trustee and said Patten, claiming that said order as entered was not in compliance with the opinion and decision of this court, filed objections to said order, and moved said court to vacate the same and enter in lieu thereof an order tendered by said trustee and Patten, which read as follows:

"Now upon the inspection and consideration by the court of the mandates of the United States Circuit Court of Appeals in and for the Seventh Circuit and the certified copy of the opinion of the Supreme Court of the United States in case No. 139 of the October term, A. D. 1904, of said Supreme Court filed herein on October 31, 1905, and of the direction contained in said opinion, and counsel for various parties in interest herein having been duly notified, the court does find and hold that in the decree entered herein on the 29th day of October, A. D. 1902, this court should have

declined and doth decline to retain jurisdiction to determine upon the merits, the respective rights of the parties as to the matters involved in the controversy herein.

And it is ordered, in conformity with the said mandates, opinion, and direction, that the said order, judgment and decree entered herein on the 29th day of October, A. D. 1902, with reference to the disposition of the proceeds of the sale of the seed named therein, be and the same is hereby, so modified as that the said order, judgment and decree is and shall be held and taken to be without prejudice, by reason of any of the proceedings or findings in this cause, to the right of the Chicago Title and Trust Company, trustee of Alexander Rodgers, bankrupt; James A. Patten, The National Storage Company, Frank E. Winans, and E. W. Bailey & Company, and any of them, to litigate in proper court or courts upon the merits, their right, title or interest, or that of any of them, in and to the proceeds of the sale of the seed named in said decree of October 29, A. D. 1902,"

but that said District Court refused to vacate or modify the order already entered by it:

That thereupon on the 18th of December, 1905, said trustee and said Patten presented to this court, and asked leave to file, their petition for a mandamus reciting the facts hereinabove set forth and praying that a peremptory writ of mandamus issue to the said Honorable Solomon H. Bethea commanding him to vacate said order so entered by him and enter an order as requested by said petitioners and that they filed a brief in support of said application and petitioners filed one in opposition thereto, and that said motion was thereupon taken by this court under advisement, and thereafter and on the 2nd of January, 1906, this court entered in said proceeding the following order:

"*Ex Parte* in the Matter of The Chicago Title & Trust Company, Petitioner.

On consideration of the motion for leave to file a petition for a writ of mandamus herein, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said motion be, and the same is hereby, denied," which order still remains in full force and effect:

That thereafter on the 14th of March, 1906, said trustee and said Patten filed in the Circuit Court of Appeals for the Seventh Circuit their petition for mandamus against Judge Bethea, which was practically identical with the petition theretofore filed by them in this court as aforesaid, and which is attached hereto as Exhibit "A" except that the opinion of this court thereto attached as an exhibit is omitted, as also is the order of said District Court already hereinabove set out: that thereupon an alternative writ of mandamus was issued out of said court, returnable on the 10th day of April, 1906, and in pursuance thereto the said Solomon H. Bethea, Judge of said Court, made return, a copy of which, except the exhibits, is hereto attached as Exhibit B:

That thereupon said trustee and Patten moved said Circuit Court of Appeals to issue a peremptory writ of mandamus notwithstanding said return, and said court on the 24th of April, 1906, entered an order that said peremptory writ, as prayed for, issue April 25th, 1906:

That on the 26th of April, 1906, your petitioners filed in said court their petition reciting that they were the parties beneficially interested in said manda-

mus suit, and desired to prosecute a writ of error to reverse said judgment, and praying for leave so to do; and that said writ of error might be made a supersedeas upon their filing a proper bond, and on the same day said court entered in said cause an order allowing said intervention, preserving to your petitioners their exception to the entry of said judgment, and said Judge Bethea appeared and declined to sue out or join in such writ, and said court duly allowed your petitioners to sue out a writ of error upon giving a bond in the sum of $500 (which was duly filed), but refused to make said writ of error a *supersedeas*, and a citation was thereupon duly issued and served and a transcript of the record of said cause was thereafter duly filed in this court and docketed as case No. 20,265, or No. 301 on its docket for the October term, 1906.

That after petitioners had duly petitioned for and been allowed said writ of error and on the same day, but, as petitioners are informed and believe and charge, after they had filed their said bond, said trustee and Patten caused said peremptory writ of mandamus to be served upon said judge of said District Court, and in obedience thereto on the 27th of April, 1906, said judge entered the following order:

"Now, it appearing to the court here, that heretofore in this cause certain mandates of the United States Circuit Court of Appeals were filed herein, together with a certified copy of the opinion of the Supreme Court of the United States in case No. 139 of the October term, A. D. 1904, of said Supreme Court, and that a certain order was on November 1, 1905, entered by the court in the said cause, and it further appearing from the certain writ of mandamus from the

said United States Circuit Court of Appeals to the judge of this court, bearing teste the twenty-fifth day of April, A. D. 1906, that the said order of November 1, 1905, is to be vacated and set aside and in lieu thereof an order is to be entered in the said cause in accordance with the said writ of mandamus.

It is therefore ordered and decreed by the court that the said order of November 1, 1905, be and the same is hereby vacated and set aside;

And thereupon it is further ordered, adjudged and decreed by the court that the certain order, judgment and decree entered in this cause on the twenty-ninth day of October, A. D. 1902, be and the same is hereby so modified as that the said order, judgment and decree of October 29, 1902, shall, in the respects that the same orders, adjudges and decrees the return of the proceeds of the sale of property as described therein, namely, that the said The First National Bank of Chicago retain a certain sum of money from the said proceeds and pay over the balance thereof to other parties as directed in said order and decree of October 29, 1902, be held and taken to be without prejudice by reason of any of the proceedings in this cause, to the right of The Chicago Title & Trust Company, Trustee of Alexander Rodgers, Bankrupt, James A. Patten, The National Storage Company, Frank E. Winans, and E. W. Bailey & Company, and any of them, to litigate in a proper court or courts upon the merits, their right, title or interest, or that of any of them, in and to the said property, represented by the said proceeds of sale, named in said decree of October 29, A. D. 1902."

That in said cause in this court the defendants in error filed their motion to dismiss said writ of error upon the ground that petitioners were not entitled to such writ of error, and also upon the ground that since said writ of error was allowed said peremptory writ has been complied with; and said motion was by

stipulation filed on the 14th day of January, 1907, reserved to the hearing of the merits of said cause, and said motion and said cause are still pending and undecided in this court.

Wherefore your petitioners pray that this application may be considered by this court concurrently with said motion to dismiss said writ of error in said case No. 301, and that, if this court shall grant said motion, it also direct that a writ of mandamus or other appropriate writ issue, directed to said Circuit Court of Appeals, and the Honorable Peter S. Grosscup, Francis E. Baker, and William H. Seaman, the judges thereof, and to said District Court, and the Honorable Solomon H. Bethea, as a judge thereof, commanding said Circuit Court of Appeals and its said judges to set aside its said order granting said peremptory writ of mandamus and recall the same and commanding said District Court and its said judge to set aside said order of the 27th of April, 1906, entered in pursuance of said peremptory writ; and that, if this court shall deny said motion to dismiss said writ of error and decide said cause in favor of petitioners, this court may, if necessary, in aid of said writ of error and the jurisdiction of this court thereof, issue a writ of mandamus or other proper writ directing said District Court and the said judge to annul and set aside said order of April 27, 1906, entered in obedience to said writ of mandamus; and that an order may be entered herein requiring said judges of said courts to show cause within a short day why a writ of mandamus, or other proper writ to that effect, should not issue against them, and that such other order may be

entered in the premises as justice may require. And your petitioners will ever pray.

THE FIRST NATIONAL BANK OF CHICAGO,
H. W. ROGERS and
JAMES C. ROGERS as
H. W. ROGERS & BROTHER,
By HENRY S. ROBBINS,
WALLACE HECKMAN,
JAMES G. ELSDON,
Their Counsel.

United States of America,
Northern District of Illinois, } ss.
Cook County.

Frank O. Wetmore, being first duly sworn, deposes and says that he is Vice President of the above named The First National Bank of Chicago, one of the petitioners in the foregoing petition, and is authorized to make this affidavit on its behalf; that he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

FRANK O. WETMORE,

Subscribed and sworn to before me this 16th day of April, A. D. 1907.

MARTIN HOWARD FOSS,
Notary Public.

(SEAL)

EXHIBIT "A."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

October Term, A. D. 1905.

Ex parte The Chicago Title & Trust Co., Trustee of Alexander Rodgers, Bankrupt, and James A. Patten, Petitioners.

PETITION FOR MANDATE OR MANDAMUS.

To the Honorable the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioners herein, The Chicago Title and Trust Company, trustee of Alexander Rodgers, bankrupt, and James A. Patten, respectfully show to this Honorable Court that on, to-wit; October 29, 1902, in a certain cause in bankruptcy then and still pending in the District Court of the United States, for the Northern District of Illinois, Northern Division, now Eastern Division, entitled "*In re* Alexander Rodgers, Bankrupt, No. 5810," a decree was entered finding in substance that the National Storage Company, at the time the Chicago Title and Trust Company, as receiver in said cause, filed its certain petition therein, on May 13, 1901, and also at the time of the filing of the petition in bankruptcy in said cause, was entitled to possession and had possession of certain property, to-wit; certain seed; that said decree further ordered that the First National Bank of Chicago should retain out of certain money in its hands, the proceeds of the sale of said seed in said bankruptcy cause, a certain

sum, with interest thereon, and should pay over to H. W. Rogers & Brother a certain other sum, with interest thereon, and should pay over the National Storage Company a certain other sum, and should pay over to your petitioner, as trustee as aforesaid (the said receiver in the meantime having been selected as trustee), the balance of the proceeds of the sale of said seed, a copy of which decree appears in the transcript of record filed in subsequent appeals in this court hereinafter referred to, and a copy of which decree is also attached hereto and marked "Exhibit A," that from said decree of October 29, 1902, appeals were taken by your petitioners to this United States Circuit Court of Appeals, and this court, upon the hearing of said appeals, found from the evidence that the National Storage Company did not have possession of said seed and was not entitled to the possession thereof, as found by said District Court, and reversed said decree of the District Court and remanded said cause with directions to decree in favor of your petitioner, The Chicago Title & Trust Company, trustee as aforesaid.

Your petitioners further show that they were respondents in a certain case of *certiorari* heretofore pending in the Supreme Court of the United States between the First National Bank of Chicago and Henry W. Rogers and James C. Rogers, partners as H. W. Rogers & Brother, petitioners, against the Chicago Title & Trust Company, trustee of Alexander Rodgers, bankrupt, James A. Patten, and others, respondents, which case was No. 139 of the October Term, A. D. 1904, of said Supreme Court, which case of *certiorari*

brought up to said Supreme Court for review the question of jurisdiction of the said Circuit Court of Appeals and of said District Court; that such proceedings were had in said case that an opinion of said Supreme Court was filed therein on, to-wit: the 15th day of May, 1905, and was duly recorded by the clerk of that court, in which opinion, without passing upon the merits of the controversy, it was held that an appeal from the said District Court to the said Circuit Court of Appeals would not lie, and that the decree of the said Circuit Court of Appeals should be reversed, with directions to dismiss the appeals and remand the cause to the said District Court for further proceedings in conformity with said opinion, and further held that the District Court should have declined, upon its findings, to retain jurisdiction, and that the decrees for the return of the money should have been without prejudice to the right of respondents in said case of *certiorari* to litigate in a proper court, and directed that such modification be made, and thereupon a judgment or decree was duly entered in said Supreme Court upon the said opinion being filed and recorded as aforesaid.

Your petitioners further show that a mandate was duly issued by the clerk of said Supreme Court to this United States Circuit Court of Appeals, and was filed therein on, to-wit: the 12th day of October, A. D. 1905, and that upon the filing of the same, orders were duly entered in this court dismissing said appeals and remanding the cause to said District Court for further proceedings in conformity with said opinion, and mandates were duly issued accordingly from this court to the District Court of the United States, for the North-

ern District of Illinois, Eastern Division, copies of which mandates appear in said transcript, marked "Exhibit A."

Your petitioners further represent that after said mandates were issued by this court they caused the same, together with a duly certified copy of said opinion of the Supreme Court, to be filed in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on the 31st day of October, A. D. 1905, and on that date made application to the Honorable Solomon H. Bethea, the presiding judge of said court, sitting in bankruptcy, to enter an order as directed by said mandates, in conformity with the said opinion of said Supreme Court filed therewith and the directions therein contained, and that upon said application an order was entered by said judge on November 1, A. D. 1905, a copy of which appears in said transcript, marked "Exhibit A."

Your petitioners further show that the said order entered in the said District Court upon November 1, 1905, as entered, was against the will and consent of your petitioners, and that they were and are advised and charge the fact to be, that the said order is not in conformity with the directions of this Honorable Court; that therefore on, to-wit: the 16th day of November, A. D. 1905, they appeared and filed exceptions and objections to the said order, in said District Court, and moved the court to vacate and set aside the same and to enter in lieu thereof an order in conformity with such opinion and directions of the Supreme Court, and to that end presented with said motion a form of order which, as your petitioners were and are ad-

vised, and show to this court, is in conformity with the said opinion and directions of said Supreme Court, and moved that the said order, or the substance thereof, be entered, which exceptions and objections were on that date overruled by the court, and which said motion was denied, all of which more fully appears by a copy of said motion and order as presented, appearing in said transcript, marked "Exhibit A."

Your petitioners further show that the determination of the question as to what party had possession of the said property at the times named in said decree of October 29, 1902, and in said order of November 1, 1905, and consequently the right to the said property, and the proceeds thereof, will, as appears from the transcript of record on file in said appeals in this court, be the controlling issue in any litigation which the said trustee and respondents or any of them may take in a proper court, as appears from the records of the said case heretofore in this court.

Your petitioners further represent that said order entered in said District Court on November 1, A. D. 1905, is not in compliance with the mandates of this Honorable Court and the directions therein contained, as a whole, and particularly in the following respects:

1. That notwithstanding the direction contained in the opinion of said Supreme Court that "the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made," the legal effect of the said order is to make the decree of October 29, 1902, as thereby modified, *res adjudicata* as to the facts regarding the possession

of the seed in controversy at the times named in said order.

2. That notwithstanding the direction aforesaid, said order provides an additional modification that the whole of the proceeds of the sale of the seed represented by said certificates held by the First National Bank and H. W. Rogers & Brother, respectively, shall be turned over to them, thus decreeing said parties an amount several thousand dollars in excess of that provided in the original decree (the amounts of such proceeds and terms as to interest are shown in the transcript of record on file in this court in the said appeals, at pages 60 and 69, 56 and 82); and further provides that only one respondent, namely, the Chicago Title & Trust Company, as trustee, shall litigate as to such fund, and that its said right is limited by the further qualification in said order if said District Court "shall so authorize," which modification and limitation were not directed by said Supreme Court, in said opinion referred to in said mandates of this court.

Your petitioners further represent that they are advised the said opinion of said Supreme Court and the directions therein contained require that an order be entered in said District Court which would not affect the merits of the controversy in any suit which may hereafter be brought in a proper court or courts, or limit the right of any of the said respondents to bring suit; and they further represent that their motion be set aside the said order of November 1, A. D. 1905, and for the entry of another order, was made for the purpose of protecting the rights of such respondents, that full justice might be done, and the matters in

controversy fully litigated in a proper court or courts without prejudice on account of any of the proceedings in the said District Court, or of any findings therein.

Your petitioners further represent that the time within which they may bring suit or suits to enforce their rights will expire by limitation under the laws of the State of Illinois, on or about May 1, A. D. 1906, and that any other proceedings that might lawfully be taken than that pursued herein would not afford them adequate relief against the effect of said erroneous order.

Your petitioners therefore respectfully pray that in view of the said mandates of this Honorable Court and said opinion of the Supreme Court of the United States, and the directions therein contained, and of the subsequent proceedings in the District Court of the United States, for the Northern District of Illinois, Eastern Division, a special mandate or other appropriate writ may be issued by this court, directed to the judges of said District Court, commanding that the said order entered in said District Court on the 1st day of November, A. D. 1905, be set aside, and that in lieu thereof an order be entered in accordance with the said opinion and directions of said Supreme Court, so modifying the decree entered by said District Court, on- to-wit: the 29th day of October, A. D. 1902, as that said decree shall provide that the respondents in the case heretofore in said Supreme Court, of First National Bank and Henry W. Rogers and James C. Rogers, partners trading as H. W. Rogers & Brother, petitioners, against the Chicago Title & Trust Company,

trustee of the estate of Alexander Rodgers, bankrupt, and others, respondents, may litigate in a proper court the matters in controversy without prejudice on account of any of the proceedings in said District Court, or findings made therein, or that a rule be entered upon the Honorable Solomon H. Bethea, judge of the United States District Court, for the Northern District of Illinois, Eastern Division, requiring him to show cause within a short day to be fixed by this court, why a writ of mandamus to said effect should not be issued against him, and that such other order may be entered in the premises as justice may require.

And your petitioners will ever pray, etc.

THE CHICAGO TITLE AND TRUST COMPANY,
Trustee of Alexander Rodgers, Bankrupt.
By WILLIAM R. FOLSOM,
Treasurer.
JAMES A. PATTEN,
Petitioners.

JOSEPH E. PADEN, and
NEWTON WYETH,
Counsel for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss:

William R. Folsom, being duly sworn, on his oath deposes and says that he is the treasurer of the above named The Chicago Title and Trust Company, trustee of Alexander Rodgers, bankrupt, and that he is authorized to make this affidavit on its behalf, as well as on behalf of the co-petitioner, James A. Patten; that he has read the foregoing petition signed by the

said trustee and James A. Patten, and knows the contents thereof, and says that the same is true in substance and in fact.

WILLIAM R. FOLSOM.

Subscribed and sworn to before me this ..... day of January, A. D. 1906.

HENRY J. TANSLEY,
Notary Public.

(Seal)

EXHIBIT A.

Be it remembered that heretofore, to wit, on the 29th day of October, A. D. 1902, the following order was had and entered of record, *in re* Alexander Rodgers, Bankrupt, No. 5810, before the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Northern Division.
Wednesday, *October* 29, *A. D.* 1902.

Present:
The Hon. Christian C. Kohlsaat, Judge.
5810.
In re Alexander Rodgers, Bankrupt.

This cause coming on now to be heard, it is on motion ordered that the First National Bank of Chicago have leave to amend its petition on the face thereof by striking out the words "an equitable" and inserting in lieu thereof the article "a" in the sixth line of the

fifth page of said petition, which is thereupon done; and it is further

Ordered That all answers to said petition as originally filed shall stand as answers to the same as amended.

And this cause coming on now to be heard upon the petition of the receiver and trustee herein, the Chicago Title and Trust Company, the amended petition of The First National Bank of Chicago, Illinois, the petition of H. W. Rogers and James C. Rogers, the petition of the National Storage Company, the petition of Frank E. Winans, and upon the answers to said several petitions of the various creditors and parties, and upon the report filed herein August 5, 1901, of the referee, Sidney C. Eastman, and upon the exceptions to said report, and upon the evidence taken before said referee to whom the said several petitions have been heretofore referred; and the said several petitioners and creditors and parties being represented and being in court herein, and the said bankrupt Alexander Rodgers being represented by his counsel, and the court having considered said several petitions and the referee's report, and the evidence taken before the referee, and having heard the arguments and suggestions of counsel for said several petitioners and for the various creditors and parties and for the said bankrupt, and being fully advised in the premises, the court doth

Order, adjudge and decree that the said report of the said referee heretofore filed herein on August 5, 1901, be and the same is hereby approved and confirmed, except in so far as the same finds a lack of ju-

risdiction in this court, which jurisdiction is hereby sustained.

And the court further finds that the receiver in this case had not, at the time of the filing of its petition herein, to wit, on May 13, 1901, the right of possession of the property designated in the answers of the National Storage Company, The First National Bank, H. W. Rogers & Bro., Small & Co., and Kirkpatrick & Co., thereto.

And the court further finds that the National Storage Company was at the said date, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession, and had possession of said property.

And it further appearing to the court that the property described in said petitions has been sold by The First National Bank of Chicago, under an order heretofore entered herein; and that the proceeds of said sale are now in possesion of said The First National Bank of Chicago, Illinois, except the sum of five thousand dollars ($5,000.00) heretofore paid over by said The First National Bank of Chicago, Illinois, to the trustee herein, under an order of court heretofore entered herein; and it further appearing to the court that the said The First National Bank of Chicago is justly and equitably entitled to be paid out of said funds the sum of nine thousand eight hundred and fifty-four dollars and fifteen cents ($9,854.15), with interest thereon at the rate of five per centum per annum according to the tenor of the promissory notes of the bankrupt mentioned in said petition of said bank, which said promissory notes are secured by the following storage warrants of the National Storage Company, to wit:

Receipt No.	9426	Lot No.	60	244	bags	Hungarian seed.
" "	9427	" "	61	80	"	Clover.
" "	9425	" "	59	250	"	Hungarian.
" "	9348	" "	58	70	"	Alsike.
" "	9246	" "	50	322	"	of Timothy.

Receipt No.	9195	Lot No.	47	351	bags	of Buckwheat.
" "	9244	" "	54	250	"	of Timothy.
" "	9118	" "	40	247	"	"
" "	8408	" "	8	250	"	"
" "	8489	" "	25	250	"	"
" "	8928	" "	33	250	"	"
" "	8406	" "	6	225	"	"
" "	8437	" "	20	250	"	"

And it further appearing to the court that the said petitioners H. W. Rogers and James C. Rogers are also justly and equitably entitled to be paid out of said fund the sum of five thousand dollars ($5,000), with interest thereon at the rate of five per centum per annum according to the tenor of the promissory notes of the bankrupt mentioned in said petition of said H. W. Rogers & Brother, which said promissory notes are secured by the following storage warrants issued by the Notional Storage Company, to wit:

Receipt No.	9154	Lot No.	43	250	bags	Timothy seed.
" "	9155	" "	44	250	"	" "
" "	9224	" "	50	250	"	" "
" "	9227	" "	53	250	"	Red Top seed.
" "	9436	" "	62	221	"	Buckwheat seed.

And it further appearing to the court that the said petitioner National Storage Company is entitled to the sum of Fourteen dollars and ninety-nine cents

($14.99) for storage charges upon said property, due at the date of filing the petition in bankruptcy herein, under its contract with said bankrupt; and it further appearing to the court that said National Storage Company is entitled to a preferential claim and lien on said fund for payment of the said sum of fourteen dollars and ninety-nine cents ($14.99): it is therefore

Ordered, adjudged and decreed by the court that said The First National Bank of Chicago retain out of the proceeds of said sale the sum of nine thousand eight hundred and fifty-four dollars and fifteen cents ($9,854.15), with interest at the rate of five per cent. per annum, as aforesaid; and that said The First National Bank of Chicago pay over to said H. W. Rogers & Bro. out of said funds in its hands as aforesaid, the said sum of five thousand dollars ($5,000.00), together with interest thereon at the rate of five per centum per annum as aforesaid, and that said The First National Bank of Chicago also pay over to said National Storage Company out of said funds in its hands as aforesaid the sum of fourteen dollars and ninety-nine cents ($14.99); and that said The First National Bank of Chicago pay over to the trustee in said cause, the Chicago Title and Trust Company, the balance of the proceeds of said sale. And the court doth further

Order, adjudge and decree that the trustee herein, the Chicago Title and Trust Company, pay all the costs arising under the hearing of the said petitions of the Chicago Title and Trust Company, The First National Bank of Chicago, H. W. Rogers and James C. Rogers, and the National Storage Company, including the referee's fees, and the costs, amounting to two

hundred and twelve dollars and fifty cents (212.50), of printing the abstract, which costs of printing the court finds to have been advanced by the National Storage Company. The court doth further

Order, adjudge and decree that the petition of Frank E. Winans aforesaid, and any and all other petitions filed in said cause, claiming any right to or lien on any portion of the property described in the foregoing petitions and storage warrants, and not heretofore disposed of, be, and the same are hereby, dismissed.

And thereupon, said Chicago Title and Trust Company, trustee, by its counsel, duly excepts to the said findings and the said judgment and decree of the court, and prays an appeal herein from the said judgment and decree, and the said James A. Patten, by his counsel, duly excepts to the said findings and the judgment and decree, and likewise prays an appeal herein from said judgment and decree, and prays also to join in said appeal of said trustee, to the United States Circuit Court of Appeals in and for the Seventh District.

And afterwards, to-wit: on the 31st day of October, A. D. 1905, there was filed in the clerk's office of said court, in the above entitled cause, a certified copy of the opinion of the Supreme Court of the United States, same being in the words and figures following, to-wit:

(Here follows Supreme Court opinion.)

And afterwards, to-wit: on the 31st day of October, A. D. 1905, there was filed in the clerk's office of said court, in the above entitled cause, a mandate, same being in the words and figures following, to-wit:

United States of America. } ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Northern Division, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Illinois, before you, or some of you, in a cause in the matter of Alexander Rodgers, Bankrupt, the decree was entered on the twenty-ninth day of October, 1902, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an appeal agreeably to the Act of Congress in such case made and provided fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit, on motion of counsel for appellee for leave to file mandate of the Supreme Court of the United States.

On consideration whereof, it is now here ordered by the court that appellees be and they are hereby granted leave to file instanter the mandate of the Supreme Court of the United States issued in this cause. And the court having inspected said mandate and being fully advised in the premises, on consideration thereof, it is now here further ordered, adjudged and decreed by this court

that the appeal from the United States District Court for the Northern District of Illinois heretofore taken herein be and the same is hereby dismissed with costs in accordance with said mandate, and said cause is remanded to the District Court of the United States for the Northern District of Illinois for further proceedings in conformity with the opinion of the Supreme Court of the United States in case No. 139 of the October Term, A. D. 1904, of said court. October 12, 1905.

You, therefore, are hereby commanded that such further proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of October, in the year of our Lord one thousand nine hundred and five.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal)

Endorsed: "5810. District Court of the United States, Northern District of Illinois, Eastern Division. In *re Alexander Rodgers, Bankrupt.* Mandate. Filed by leave of Court October 31, 1905, at 10 o'clock. a. m. T. C. MacMillan, Clerk."

(The above mandate is here again set out.)

And afterwards, to-wit, on the 31st day of October, A. D. 1905, the following order was had and entered of record in said cause, before the Hon. S. H. Bethea, judge of said court, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Tuesday, October 31, A. D. 1905.

Present, the Honorable S. H. Bethea, Judge.

5810.

In re Alexander Rodgers, Bankrupt.

On motion and on due notice to all parties in interest, the court being fully advised in the premises, it is ordered that leave be, and it is hereby, given the trustee herein to file the mandate of the United States Circuit Court of Appeals for the Seventh Circuit and a certified copy of the opinion of the United States Supreme Court, and now this matter coming on to be heard upon motion of said trustee, by its solicitors, for the entry of a decree modifying the decree heretofore entered herein in accordance with said opinion of the United States Supreme Court, the court being not sufficiently advised in the premises as to the form of said decree, takes time to consider.

And afterwards, to-wit, on the 1st day of November, A. D. 1905, the following order was had and entered of record in said cause, before the Hon. S. H. Bethea, judge of said court, to-wit:

(Here follows order of November 1, 1905, set out in the petition.)

And afterwards, to-wit, on the 16th day of November, A. D. 1905, there was filed in the clerk's office of said court, in the above entitled cause, exceptions and motion, same being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois, Eastern Division.

In re Alexander Rodgers, Bankrupt. In Bankruptcy.

No. 5810.

Come now the Chicago Title and Trust Company, trustee of Alexander Rodgers, Bankrupt, in the above entitled cause, and James A. Patten, and jointly and severally except and object to the order and findings entered herein on November 1, 1905; for that the said order and findings were and are not in compliance and conformity with the opinion of the Supreme Court of the United States and the direction therein contained as shown by a certified copy of said opinion filed herein on October 31, 1905, together with the mandates from the United States Circuit Court of Appeals in and for the Seventh Circuit, filed herein on the same date.

And the said Chicago Title and Trust Company, trustee as aforesaid, and the said James A. Patten, jointly and severally now here move the court to vacate and set aside said order and findings of November 1, 1905, and to enter in lieu thereof an order and decree herein pursuant to said mandates in conformity with said opinion of the Supreme Court of the United States, as follows (or substantially as follows, pursuant to said mandate in conformity with said opinion), to-wit:

Now upon the inspection and consideration by the court of the mandates of the United States Circuit Court of Appeals in and for the Seventh Circuit and the certified copy of the opinion of the Supreme Court of the United States in case No. 139 of the October

Term, A. D. 1904, of said Supreme Court filed herein on October 31, 1905, and of the direction contained in said opinion, and counsel for various parties in interest herein having been duly notified, the court does find and hold that in the decree entered herein on the 29th day of October, A. D. 1902, this court should have declined and doth decline to retain jurisdiction to determine upon the merits, the respective rights of the parties as to the matters involved in the controversy herein.

And it is ordered, in conformity with the said mandates, opinion, and direction. that the said order, judgment and decree entered herein on the 29th day of October, A. D. 1902, with reference to the disposition of the proceeds of the sale of the seed named therein, be and the same is hereby, so modified as that the said order, judgment and decree is, and shall be held and taken to be without prejudice, by reason of any of the proceedings or findings in this cause, to the right of the Chicago Title and Trust Company, trustee of Alexander Rodgers, Bankrupt; James A. Patten, The National Storage Company, Frank E. Winans, and E. W. Bailey & Company, and any of them, to litigate in proper court or courts upon the merits, their right, title or interest, or that of any of them, in and to the proceeds of the sale of the seed named in said decree of October 29, A. D. 1902.

CHICAGO TITLE AND TRUST COMPANY,
Trustee of Alexander Rodgers, Bankrupt.
JAMES A. PATTEN.
By NEWTON WYETH and
JOSEPH E. PADEN,
Their Attorneys.

Endorsed: "No. 5810. United States District Court, Nor. Dist. of Illinois, Eastern Division. In re Alexander Rodgers, Bankrupt, Exceptions and Motion. Filed November 16, 1905, at 10 o'clock a. m. T. C. MacMillan, Clerk. Newton Wyeth and Joseph E. Paden, Attorneys for Chicago Title & Trust Company; Trustee, James A. Patten."

And afterwards, to-wit, on the 16th day of November, A. D. 1905, the following order was had and entered of record, in said cause, before the Hon. S. H. Bethea, Judge, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

Thursday, November 16, A. D., 1905.

Present, the Honorable S. H. Bethea, Judge.

5810.

In re Alexander Rodgers, Bankrupt.

This matter coming on to be heard upon the joint and several exceptions of the Chicago Title and Trust Company, Trustee herein, and James A. Patten, to the order heretofore entered herein on November 1, 1905, and the joint and several motions of said Chicago Title and Trust Company, Trustee, and said James A. Patten to vacate said order of November 1, 1905, and for the entry of a decree pursuant to the mandate of the United States Circuit Court of Appeals for the Seventh Circuit and the opinion of the United States Supreme Court, due notice of this motion having been given all parties in interest, and all parties appearing by their solicitors, after hearing arguments of coun-

sel, the court being fully advised in the premises, it is ordered that said exceptions be, and the same hereby are, overruled, and that said motion to vacate said order of November 1, 1905, be, and the same hereby is, denied.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true copy from the record of an order made by said court in the matter of Alexander Rodgers, No. 5810, on October 29, 1902, and a true, correct and complete transcript of the record in said cause from and after the 31st day of October, 1905, as the same appears from the records and files in said cause now remaining in my custody and control.

Witness my hand and the seal of said court at my office at Chicago, in said District, this 29th day of November, A. D. 1905.

(Seal) T. C. MACMILLAN,
Clerk

Endorsed: Filed Mar. 14, 1906.
EDWARD M. HOLLOWAY,
Clerk.

EXHIBIT "B."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Chicago Title & Trust Company, Trustee, and James A. Patten, Petitioners,
vs.
Solomon H. Bethea, Judge of the United States District Court for the Northern District of Illinois, Respondent.
} Petition for Mandamus.

RETURN OF RESPONDENT TO ALTERNATIVE WRIT OF MANDAMUS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The respondent, Solomon H. Bethea, Judge of the United States District Court for the Northern District of Illinois, appearing by counsel before this honorable court, hereby makes his return and for cause why a peremptory writ of mandamus, as prayed for in the petition of said petitioners, should not be issued, respectfully shows as follows:

I. Respondent is advised by his counsel, and suggests to this Honorable Court that, inasmuch as the final decision in this case was rendered by the Supreme Court of the United States, and the decision, and the mandate issued by that court in pursuance of its decision, directed said District Court to modify, in the particulars pointed out in the opinion of the Supreme Court, the order theretofore entered by said District Court in said cause, the Supreme Court has exclusive

jurisdiction of a proceeding in mandamus, whose purpose or object is to construe and enforce that decision, and that this court is without jurisdiction of this proceeding and of the subject matter thereof, or to issue any mandamus therein.

II. This respondent, not intending to waive the question of jurisdiction hereinbefore stated, but relying on the same, further shows that on the 18th day of December, 1905, said petitioners presented to the Supreme Court of the United States their petition for mandamus, and thereupon moved said court for leave to file said petition and for a writ of mandamus thereupon, a copy of which petition is hereto attached and made a part hereof as Exhibit "A"; and that said petition for mandamus contained substantially all the allegations set out in the present petition in this court and raised all the questions raised by this petition, and insisted that this respondent had failed to comply with the said mandate of the Supreme Court upon the same grounds and in the same particulars as are asserted in the petition on which the alternative writ was issued in this court; and that respondent is further informed and believes that in support of said petition and motion the petitioners herein filed in that court a printed brief, in which said petitioners sought to enforce all the positions asserted in said petition, and sought to show that this respondent had not, in the order entered upon said mandate, complied with said mandate and the decision of that court, a copy of which brief is also annexed hereto and made a part hereof as Exhibit "B."

And respondent is further informed and believes

that the First National Bank of Chicago, and H. W. Rogers & Brother, parties to said original cause, resisted the motion in said Supreme Court, and in opposition thereto also filed a printed brief, and that said petition and motion were thereupon taken by said Supreme Court under advisement upon said briefs, and that thereafter, and on the 2nd day of January, 1906, the said Supreme Court entered in said proceeding the following order:

"SUPREME COURT OF THE UNITED STATES.

No. ——, Original, October Term, 1905.

Ex parte in the Matter of The Chicago Title & Trust Company, Petitioner.

On consideration of the motion for leave to file a petition for a writ of mandamus herein, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said motion be, and the same is hereby, denied," which order still remains in full force and effect.

And respondent is further informed by counsel that said First National Bank and H. W. Rogers & Brother insist that said action of said Supreme Court is a final decision of the Supreme Court, which is binding on the petitioners herein, and that petitioners herein are not entitled to a peremptory writ of mandamus to compel respondent to change the order heretofore entered by this respondent in said District Court, and that such action of the Supreme Court constitutes a decision of that court that said order so originally entered upon said mandate constitutes a full and substantial com-

pliance with the decision of the Supreme Court and its mandate issued thereon.

And this respondent says that he is advised, and is himself of the opinion, that he could not enter the order in the form requested by the petitioners herein, and could not now change the order so entered by him in said District Court, without showing disrespect to the authority and decision of the said Supreme Court of the United States, and that, were respondent to assume any other attitude as respects this proceeding and subject-matter, he would place himself in antagonism to the views and decision of the Supreme Court of the United States; and that respondent is advised and believes that such action of said Supreme Court upon said application for mandamus is *res adjudicata* and conclusive as respects all the questions involved in this present proceeding, and as such is binding upon this respondent as well as this court.

III. This respondent further shows that, while sitting in said District Court, he has given careful consideration to the decision of the Supreme Court and the arguments of parties respecting the meaning thereof and the form of the decree and the extent of the modifications in the original decree that said decision and the mandate issued thereon directed and called for, and that as a result of said consideration this respondent reached the conclusion, and still thinks, that the order entered by him on the 1st of November, 1905, and set out in Exhibit "A" to the petition filed herein, is such a modification of the previous order in said District Court, as said Supreme Court in its said decision and mandate directed to be made, but that if in

this respondent is mistaken, and if this court has jurisdiction of this application and it shall be decided that said order so entered by respondent is not in compliance with the decision and mandate of the Supreme Court, this respondent is willing to enter in said District Court any order which shall be decided to be proper.

Whereupon Respondent asks that he may be hence dismissed with his reasonable costs in this behalf, including counsel fees.

SOLOMON H. BETHEA,
Judge of the United States District Court for the Northern District of Illinois.

HENRY S. ROBBINS,
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1906.

Ex parte The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, *Petitioners.*	Petition for Mandamus.

To the Honorable Peter S. Grosscup, Francis E. Baker, and William H. Seaman, as Judges of the Circuit Court of Appeals for the Seventh Circuit, and the Honorable Solomon H. Bethea as Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, and Joseph E. Paden and Newton Wyeth, Counsel for The Chicago Title & Trust Company, Trustee of Alexander Rodgers, Bankrupt, and James A. Patten:

PLEASE TAKE NOTICE That on Monday, the 22nd day of April, A. D. 1907, at the opening of court, or as soon thereafter as counsel can be heard before the Honorable the Supreme Court of the United States, we shall present a petition for mandamus, to be directed against the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, and Honorable Solomon H. Bethea, as Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, as respond-

ents, and a motion for leave to file the same, and suggestions in support of said motion, copies of which petition for mandamus, motion, and suggestions in support thereof are herewith served upon you:

At which time and place you may appear if you see fit.

HENRY S. ROBBINS,
WALLACE HECKMAN,
JAMES G. ELSDON,
Counsel for The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother.

Received copies of above notice, petition, motion, and suggestions, this 16 day of April, A. D. 1907.

NEWTON WYETH;
Counsel for Chicago Title & Trust Co., Trustee of Alexander Rodgers, Bankrupt.

MARTIN H. FOSS,
Counsel for Soloman H. Bethea, District Judge, etc.

United States of America,
State of Illinois,
County of Cook. } ss.

Will C. Moody, being first duly sworn, deposes and says, that he served the foregoing notice of motion and the therein mentioned petition for mandamus, motion and suggestions in support of motion, upon the Hon. Peter S. Grosscup, Francis E. Baker and William H. Seaman, as Judges of the Circuit Court of Appeals for the Seventh District, by delivering to each of said Judges true copies of said notice, petition, motion and suggestions, this seventeenth day of April, A. D. 1907.

The affiant further says that he served said notice and the therein mentioned petition, motion and suggestions, upon Joseph E. Paden, counsel for James A. Patten, by delivering true copies of said notice, petition, motion and suggestions to Edith A. Anderson, a clerk in the office of said Paden, this seventeenth day of April, A. D. 1907.

Will C. Moody.

Subscribed and sworn to before me this 17th day of April, 1907.

Albert Cotsworth,
(seal) *Notary Public.*

IN THE SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1906.

Ex parte The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, *Petitioners.*	Petition for Mandamus.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

Now come The First National Bank of Chicago, and H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, by Henry S. Robbins, Wallace Heckman and James G. Elsdon, their counsel, and move the court for leave to file a petition praying that a writ of mandamus, or other appropriate writ, issue to the Judges of the Circuit Court of Appeals for the Seventh Circuit, and the Honorable Solomon H. Bethea, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, (a copy of which petition is also herewith presented), and that a rule be entered requiring said Judges to show cause within a short day to be fixed by this court why such writ should not issue against them as prayed in said petition.

The facts and objects of said motion are as follows:

This court heretofore issued to your petitioners its writ of *certiorari* to review a decision of said Circuit Court of Appeals, in an appeal from a bankruptcy

proceeding, and thereafter this court decided such *certiorari* in favor of these petitioners and directed the Circuit Court of Appeals to dismiss said appeal from the said District Court; and this court also directed the District Court to modify its order in one respect. (See 198 U. S., 280.)

Pursuant to this decision the District Court entered an order in compliance therewith. Subsequently The Chicago Title & Trust Company, as Trustee of Alexander Rodgers, Bankrupt, and James A. Patten, a creditor of said bankrupt, who were respondents in said *certiorari*, claiming that the order entered by the District Court was not in compliance with the decision of this court, moved for leave to file in this court a petition for mandamus, requiring said District Judge to change said order; but this court denied said application: whereupon said parties made a similar application for mandamus to said Circuit Court of Appeals, which court issued a peremptory writ of mandamus commanding said District Judge to change the order of said District Court as desired by said respondents in said *certiorari*.

To review this order directing a peremptory writ, your petitioners sued out a writ of error from this court, and the same stands as case No. 301 on this term's docket of this court. A motion to dismiss said writ of error has been made by said trustee in bankruptcy and creditor on the grounds (1) that no writ of error lies; and (2) that such writ of error has become inoperative for the reason that the District Judge has complied with the peremptory writ of mandamus.

The object of this petition for mandamus or other appropriate writ is to secure such writ in lieu of said writ of error, if said writ of error should be dismissed; and if it should not be dismissed, and if this court should decide that, by reason of the entry of the order in the District Court in compliance with said peremptory writ, this court had not ample power upon the writ of error alone to set aside said order entered by the District Court, then that such writ of mandamus, etc., might issue in *aid* of the jurisdiction of this court on writ of error, and to direct said District Judge to set aside said order entered in obedience to said peremptory writ, and restore the order previously entered by him upon the mandate of this court.

These facts and objects are further amplified and explained in the suggestions in support of this motion, herewith filed.

HENRY S. ROBBINS,
WALLACE HECKMAN,
JAMES G. ELSDON,
Counsel for Petitioners, The First National Bank of Chicago, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.*	**Petition for Mandamus.**

SUGGESTIONS IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

I.

This is an application for a mandamus or other appropriate writ to secure to these petitioners the benefit of this Court's decision in their favor in *First National Bank of Chicago* v. *Chicago Title & Trust Company, Trustee,* 198 U. S., 280, and to protect an order, entered in the District Court in pursuance of such decision and the mandate issued thereunder, from

alteration by the Circuit Court of Appeals of the Seventh Circuit.

This District Court entered in a bankruptcy proceeding there pending an order adjudging these petitioners entitled to the proceeds of certain seeds in the possession of a storage company and covered by warehouse receipts issued by it to the bankrupt and by him pledged to petitioners.

From this order appeals were prosecuted by the trustee in bankruptcy and a creditor to this Circuit Court of Appeals, which reversed upon the merits. Upon *certiorari*, however, this court held that the Circuit Court of Appeals was without jurisdiction, because the bankrupt act provided for no appeal in such a case. and that, as the storage company was in possession, the District Court was also without jurisdiction to decide more than the question of possession. Thereupon this court reversed with directions to the Circuit Court of Appeals to dismiss the appeal and remand the case to the District Court, that it might make its order "without prejudice to the right of respondents to litigate in a proper court, which modification *we direct to be made.*"

The Circuit Court of Appeals thereupon dismissed the appeal and remanded to the District Court "for further proceedings in conformity with the opinion of" this court. Upon the filing of this mandate the District Court (the Honorable Solomon H. Bethea, District Judge presiding) set aside its previous order and entered such order (set out on pp. 4 and 5) of the petition) as he thought a compliance with the direction of this court.

This trustee in bankruptcy and creditor being of a contrary opinion, filed in this court on the 18th of December, 1905, their motion for leave to file a petition for mandamus to compel this District Judge to enter an order in accordance with their interpretation of this court's decision. In the printed suggestions in support of said motion, their counsel, who also resist the present application, said:

"If it be objected that the order of the District Court could be reviewed in some way by the Circuit Court of Appeals, we respectfully suggest in reply that in a case where the District Court has no right to exercise any discretion but must only carry into effect the directions or mandate of the Supreme Court, the latter court and not the Circuit Court of Appeals should review the order of the District Court. In this case the Supreme Court has taken the initiative in directing that the District Court modify its order in a specified way, and the Supreme Court, in the exercise of the powers conferred upon it, and in support of its dignity, is the proper court to require that its directions be obeyed."

Counsel for your petitioners, in their brief in opposition to such application, noticed the question thus raised but did not argue it, because in their opinion this view of opposing counsel seemed too clear to justify an argument to the contrary. These petitioners did, however, in their brief fully discuss the question, as did opposing counsel,—whether the existing order was a compliance with this court's decision, as will appear by a reference to the briefs in that case.

This court took the case under advisement and on the 2nd of January 1906 entered an order "that said motion be, and the same is hereby, denied."

Thereafter and on the 14th of March 1906 these

same parties filed in the Circuit Court of Appeals for the Seventh Circuit another petition for mandamus against Judge Bethea, *practically identical* with the one so presented to this court, and secured thereon an alternative writ of mandamus requiring him to show cause, why he should not set aside the order already made by him and enter the one sought by them. In his return Judge Bethea called attention to the previous like application to this court and its refusal to entertain it, as above stated, and insisted that under the circumstances the jurisdiction of this court was exclusive in the premises, or that in any event this court had acted and, by denying said application, had in effect decided that the order already entered by him was a compliance with its decision; and that by reason thereof respondent could not change his order "without showing disrespect to the authority and decision of" this court and placing "himself in antagonism to the [its] views and decision."

The applicants for the writ moved for a peremptory writ of mandamus notwithstanding said return, and the Circuit Court of Appeals on the 24th of April 1906 directed the issuance of such writ on the next day.

Thereupon these petitioners filed a petition in that court claiming that they were the parties beneficially interested in the controversy and asking leave to intervene to protect their rights by prosecuting a writ of error. That court granted such leave, and Judge Bethea declining to sue out or join in a writ of error, these petitioners were allowed to do so, but that court denied their motion that the writ of error be made a *supersedeas.*

The next day, being served by said trustee in bankruptcy and creditor with a peremptory writ, Judge Bethea set aside his previous order and entered the one desired by them.

The record on this writ of error was filed in this court as case No. 20,265, No. 301 of the October Term, 1906, and on the 14th of January, 1907, the defendants in error moved to dismiss the writ of error upon the grounds (1) that no writ of error lay in such a case, (2) that, if it did, these petitioners were not entitled to intervene and sue it out, and (3) that, as the Circuit Court of Appeals had denied the *supersedeas* and defendants in error had secured a compliance by the District Judge with the peremptory writ of mandamus, they had thereby deprived petitioners of a right to review the action of the Circuit Court of Appeals in issuing such writ. This motion to dismiss has been reserved to the hearing.

Petitioners believe that the convenience of this court and the interests of all parties will be best subserved, if the present application and this motion to dismiss the writ of error should be considered by this court at the same time.

The practice of thus resorting concurrently to a writ of error and mandamus when the correct procedure is in doubt is sanctioned by

Whitney v. *Dick*, 202 U. S., 132.
Kentucky v. *Powers*, 201 U. S., 1.
Ex parte Wisner, 203 U. S., 449.
Montana Min. Co. v. *St. Louis Co.*, 204 U. S., 204, 213.

If the writ of error be dismissed, petitioners have

no other remedy, than this application, to secure in the District Court the order to which the decision of this court entitles them.

If the writ of error be not dismissed, and on the merits petitioners succeed, still, if this court shall deem it, as will be contended by defendants in error, beyond its power in reversing to direct the District Court to set aside the order entered by it in obedience to the peremptory writ and reinstate its order entered upon the mandate of this court, it would still be necessary for this court to issue a mandamus directing the District Court to do so. The writ of mandamus in such case would be appropriate and proper as a necessary *aid* to the appellate jurisdiction acquired by this court under the writ of error. The Revised Statutes confer upon this court (Sec. 716) power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of" its jurisdiction, "and agreeable to the usages and principles of law."

The writ of mandamus is oftentimes resorted to in aid of an appeal or writ of error, as to compel the lower court to allow an appeal, to sign a bill of exceptions, or otherwise perfect an appeal of a case or its own record, so that the appellate court may effectually exercise its appellate jurisdiction. The cases place no limitation upon the circumstances, under which mandamus may be issued by an appellate court for this purpose. Why may not, then, this court resort to this writ as an aid to this writ of error if, by reason of the peculiar state of the case on writ of error—due to the refusal of the lower court to grant a

supersedeas and the action of this trustee and creditor in enforcing the writ—this is necessary to effectively carry out the decision of this court upon the writ of error?

Hence in either view it is thought that this application should be considered in connection with case No. 301.

Nor is it an objection to the granting of this application, that it has not been made in apt time.

In *re Hohorst*, 150 U. S., 653.

II.

Mandamus from this court is a proper remedy to compel a compliance by the lower court with this court's decisions.

This is no longer a open question.

Gaines v. *Rugg*, 148 U. S., 228.

In *re Sanford Fork & Tool Co.*, 160 U. S., 247.

In *re Delgado*, 140 U. S., 586, 591.

Such a writ is available, not only to compel the entry of a proper decree, but incidentally to compel the lower court to *set aside* a judgment or decree entered after the filing of a mandate, which does not comply with its directions. The writ in such case commands the lower court to vacate and erase the former order and enter a proper one.

Ex parte Dubuque and Pacific R. R., 1 Wall, 69.

In *re Potts, Petitioner*, 166 U. S., 263.

Hence this court may by mandamus compel the Cir-

cuit Court of Appeals to set aside its order and recall its peremptory writ of mandamus, and also require the District Court to set aside the order entered by it in compliance with such peremptory writ, when this is necessary to give to the parties the decree, to which the decision of this court entitles them. In

Gaines v. *Rugg, supra,*

this court sustained mandamus, instead of requiring a new appeal, in view of the delay to be caused thereby. But whether mandamus is a concurrent remedy with appeal or writ of error to compel compliance with a mandate or not, is not here material, as, if the petitioners were not entitled to prosecute this writ of error, as contended by the defendants in error, this application for mandamus is their only remedy.

So, if this mandamus is proper in aid of the writ of error, this question becomes immaterial.

On the merits of this application the questions are the same as in case No. 301. *We therefore adopt for the balance of this brief the argument presented in that case upon these questions, which is as follows:*

III.

The Circuit Court of Appeals was without power or jurisdiction to grant this writ of mandamus.

In the original case (198 U. S., 292) this court said:

"In our view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, *which modification we direct to be made.*"

In other words, this court has directed the entry in the District Court of a modified order. This is tantamount to directing a new decree in that court, and the question here is the same as it would have been, if this court had directed an entirely new order in that court.

But when this court does this, the order entered in the lower court is in reality the decree of this court.

Thus in

Stewart v. *Salamon,* 97 U. S., 361,

where this court had reversed a cause and remanded it for further proceedings in conformity with its opinion, this court, in speaking of the decree entered upon the mandate, said:

"Such a decree, when entered, is in effect our decree."

So, under the rule which requires leave from the court entering the decree as a prerequisite to a bill of review, it has been held that no such bill may be filed in a cause in which this court has directed a certain decree, *without leave of this court,* because the decree sought to be reviewed is in effect the decree of this court.

Kimberly v. *Arms,* 40 Fed., 549,

where Judge Jackson, in refusing leave to file a bill of review, said:

"The decree of May, 1899, which the proposed bill of review seeks to impeach, is the decree, not of this court, but of the supreme court; and the only power which this court can rightfully exercise over the same is to carry it into execution. * * *

The court rendering the decree should properly exercise the discretion of granting or withholding leave to the unsuccessful party to file a bill of review to im-

peach or set it aside either for error apparent or for new matter."

Southard v. *Russell,* 16 How., 546, 569,

where this court said:

"As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with." See also,

In re Potts, 166 U. S., 263.

Skillern's Ex'rs. v. *May's Ex'rs.,* 6 Cranch, 267.

Ex parte Story, 12 Pet., 339.

United States v. *Knight,* 1 Black, 488.

Under these authorities, the modified order first entered in the District Court, which the mandamus writ sought to change, was in effect the decree of this Court, and the Circuit Court of Appeals was without jurisdiction to change it.

The power to construe and enforce a decision of this court by mandamus is exclusively in this court.

Neither this court, nor a Circuit Court of Appeals, has any original jurisdiction in mandamus. The only jurisdiction either has is limited to the issuance of that writ *in aid of its appellate jurisdiction.* It rests upon the following statutory provisions:

"The Supreme Court and the circuit and district courts shall have power to issue * * * all writs not specifically provided for by statute, which may be necessary *for the exercise of their respective jurisdictions,* and agreeable to the usages and principles of law." Sec. 716, U. S. Rev. Stat.

"That the circuit court of appeals shall have the powers specified in Section 716," etc. Act of March 3, 1891; Chap. 517, Sec. 12.

It is essential to the efficiency of every appellate tribunal, that it should have power to construe its own decision and enforce compliance therewith by the lower court. When, therefore, this court directed a modification in the order of the District Court, and thus in effect directed a new decree in that court, it had ample power in a mandamus proceeding to construe its own decision and enforce the entry in the District Court of an order complying therewith. Surely, this court should not tolerate the contrary view; for to do so would impair its own jurisdiction. Its power in this respect has not, since the Court of Appeals Act of 1891, been surrendered to that court.

Such being the case, the next question is whether the Circuit Courts of Appeals have *concurrent* jurisdiction with this court to construe and enforce the latter's decisions. But is this not a case, where concurrent jurisdiction is not feasible or practicable? To sustain it would be to accord to a defeated party in this court the right to appeal to a Circuit Court of Appeals—which perhaps had decided in his favor—to construe the decision of this court.

The embarrassment which will result from such a view is shown by the present record. This court was appealed to for a mandamus to compel the entry of a different order than the one entered. This court passed upon the merits of that application, and thereby decided that the order first entered conforms to its decision. The Circuit Court of Appeals was then asked

by the same parties to decide otherwise, and direct a different order, and that court did so. Thus, we have a decision of this court that the first order conforms to its decision, and a decision of the Circuit Court of Appeals that it does not. If this can be done, then Circuit Courts of Appeals in effect sit in judgment on the decisions of this court.

Again, this court has construed the above statute as confining the right to issue mandamus to cases in aid of the jurisdiction of the court issuing the writ.

Rosenbaum v. *Bauer,* 120 U. S., 459.
Bath County v. *Amy,* 13 Wall., 244.
Smith v. *Bourbon County,* 127 U. S., 105, 112.
Davenport v. *Dodge County,* 105 U. S., 242.

Pursuant to these authorities, it has been held by the Circuit Court of Appeals of the Sixth Circuit that, where a case is disposed of in the Circuit Court upon the question of jurisdiction, to review which an appeal lies only to the Supreme Court, the Circuit Court of Appeals is without jurisdiction to issue mandamus.

United States v. *Severens, District Judge,* 71 Fed., 768.
United States v. *Swan,* 65 Fed., 647.

In the former case the court said (italics ours):

"The right to issue writs of mandamus, of course, is incidental to the other powers expressly conferred upon this court, and does not arise except where it is thus incidental. As *we could not consider a case on error presenting alone the issue of jurisdiction of the court below, we cannot exercise an appellate jurisdiction over the same subject-matter by mandamus.*"

This court decided that the Circuit Court of Appeals did not acquire jurisdiction by the appeal in the original case, and on this ground directed that court to *dismiss the appeal*. It further held that the question before the District Court was one of jurisdiction. There doubtless was (until lost by lapse of time) a right to appeal directly to this court from the original order entered by the District Court. This trustee in bankruptcy and creditor, instead of resorting to mandamus, might also have appealed directly to this court from the first order entered by the District Court upon the mandate, as the only question was upon the form of the order to be entered upon a decision of the question of jurisdiction.

It therefore cannot be said that the Circuit Court of Appeals ever had any jurisdiction of the original case, or that the right existed in that court to issue mandamus in aid of its own jurisdiction.

The fact that the mandate of this court went to the District Court *through* the Circuit Court of Appeals cannot make any difference in this principle. This court directed that court to dismiss the appeal and also directed the District Court to modify its decree. Had it only done the latter, it would have issued its mandate directly to the District Court; but to carry out its decision as respects the jurisdiction of the Circuit Court of Appeals it was necessary for this court to issue a mandate to that court to dismiss the appeal. There were in effect two mandates, but as it is not the usual, if indeed proper, practice to issue two mandates upon one decision, both mandates were combined in one. But the fact that this was the *form*, in

which it was sent down cannot affect the substance. It still remains true that, so far as the mandate applied to the District Court alone, it should be treated as in effect a mandate from this court to that court, and it is not the province of the Circuit Court of Appeals to enforce compliance with the directions of such a mandate.

It would therefore seem clear, on all the grounds above stated, that the Circuit Court of Appeals was without jurisdiction to issue mandamus, and that, as said by this court in

In re Sanford Fork & Tool Co., 160 U. S., 247, 256:

"It is for this [the Supreme] court to construe its own mandate, and to act accordingly."

IV.

But assuming the Circuit Court of Appeals had concurrent jurisdiction with this court, an application for mandamus having been made to, and been denied by, this court, that court could not properly issue the writ.

As is well known, the right of parties to mandamus—that is, the merits of the application—is frequently decided upon the application for leave to file.

In this case this trustee and creditor presented to this court practically the same petition that they subsequently presented to the Circuit Court of Appeals, and claimed that the modified order of the District Court did not comply in the particulars here asserted with the decision of this court. In support of that

petition they presented a printed brief, and a printed brief was presented in opposition. The motion was taken under advisement, and after two weeks an order was entered by the court denying the application. This order was general and not qualified. Had this court refused it upon the ground that it was without jurisdiction, or because this court wished the application made to the Circuit Court of Appeals, the order would have contained a clause reserving the right of petitioners to apply to that court. But the order as entered contained no such provision, and it is well settled that in such case the order is deemed one upon the merits.

Foote v. *Gibbs*, 67 Mass. (1 Gray), 412,

where the court in a chancery case said:

"There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal, after an appearance for the defendants. But the authorities, both in England and in this country, are decisive, that a general entry of 'bill dismissed,' with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits, and is a final determination of the controversy."

Again, in mandamus proceedings there can be but one application.

Queen v. *Mayor*, L. R., 2 Q. B. Div. (1892), 21,

where an application having been made for a mandamus, and a rule *nisi* having been discharged, the applicant made a second application, but the court held the first application was a bar to the second, saying:

"The facts in the present case are not in dispute.

As I read the authorities, it has always been held, whenever this objection has been taken and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the court in such matters. * * * Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They must come prepared with full and sufficient materials to support their application, and if those materials are incomplete, I think it is quite right that they should not be allowed to come again."

See, also,

19 Am. & Eng. Enc. of Law (2nd Ed.), p. 723.

In *Block* v. *Commissioners,* 99 U. S., 686, a party applied to a state court for mandamus to compel the taxing officials to levy a tax to pay certain bonds. To the alternative writ an answer was interposed denying the right to mandamus, and judgment was given generally for the defendant, and it was held to constitute *res adjudicata.*

See, also,

Santa Cruz Gap v. *S. Clara Co.,* 62 Calif., 40,

Weed v. *Mirick,* 62 Mich., 414-419.

V.

The first order entered by the District Court was a full compliance with the mandate and decision of this court.

The construction placed by the District Court upon this court's decision and mandate was, that this court intended *only to limit the force and effect of the decree,* in case another suit involving the merits should be instituted in a proper tribunal, that is, to change the decree from one adjudicating the merits to one based upon a want of jurisdiction.

Opposing counsel, on the contrary, contend—and the Circuit Court of Appeals held—that the intention of this court was not only to do this, but to direct the District Court to grant the trustee in bankruptcy leave to sue.

The District Court, acting under the former construction, provided in the order entered upon the mandate that the First National Bank of Chicago should receive such of the proceeds as represented property claimed by it, and H. W. Rogers & Bro. the balance of the proceeds, "without prejudice to the rights of the Chicago Title & Trust Company, the trustee herein, *if this court shall so authorize,* to litigate in any proper court the question of the right of said trustee to recover said funds as a part of the bankrupt's general estate." In other words, the order of the District Court provides that, before commencing a new suit, the trustee shall apply to the District Court for authority therefor; and counsel contend that the inser-

tion of the words italicized above constitute a failure to comply with the mandate.

What, then, is in this respect the proper construction of the mandate? It is one thing to direct in a mandate the insertion in a decree below of a limitation upon its force and effect in subsequent litigation, and quite a different thing to direct the District Court to grant leave to its trustee to embark upon new and important litigation, and this regardless of the financial condition of the estate and its ability to bear the expense thereof.

The bankrupt statute as respects some matters—largely administrative, and hence largely discretionary—vests in the District Court an *exclusive* jurisdiction. As respects such matters the power and authority of the District Court is as paramount as that of any other court, whose judgments are not reviewable. Thus the bankrupt act by sec. 7, sub-clause 7, confers upon the District Courts as courts of bankruptcy, jurisdiction to "cause the estates of bankrupts to be collected, reduced to money, and distributed," and provides for no review of its action except in certain respects not material here. Sec. 11, sub-clause c, provides that a trustee may, "*with the approval of the court,*" prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect, as if it had been comemnced by him. Sec. 47, subclause 2, provides that trustees shall collect and reduce to money the property of the estate for which they are trustee, *under the direction of the court,* etc.

Even in the absence of any such provisions, the District Court, when created a court of bankruptcy, would

have inherent jurisdiction, and, so far as the law provides no method of review, exclusive jurisdiction, to control trustees in bankruptcy and thereunder to determine, whether they should involve their estates in expensive litigation. The decision of this question in a particular case depends upon the condition of that estate, to what extent its funds are sufficient to justify such litigation, and if not, whether such litigation should be at the expense of creditors who desire it, whether the interests of the estate cannot be better promoted by settlement, and whether an effort in that direction should not be first made, etc.

This question is purely an administrative one. From a decision upon it, the bankrupt statute contemplates no appeal or petition for revision, the latter only providing a review of questions of law, and this being a question of fact and discretion. Hence, by the appeal of the original case to the Circuit Court of Appeals, that court acquired no jurisdiction to determine for the District Court, whether the trustee should start a new suit, that would involve the estate in expensive litigation. Nor did this court have upon *certiorari* this jurisdiction. For upon *certiorari* this court had no greater jurisdiction than the Circuit Court of Appeals acquired under the appeal. Section 6 of the act of March 3, 1891, gives this court upon *certiorari* only "the same power and authority in the case as if it had been carried by appeal or writ of error" to this court.

The Circuit Court of Appeals only had jurisdiction to pass upon its own jurisdiction, and being without jurisdiction, could only direct a dismissal of the appeal.

It could not direct the District Court to grant the trustee leave to sue, and this court upon *certiorari* was without power to do so.

When an appeal is prosecuted in a case where no appeal lies, the appellate court can do no more than dismiss the appeal. It cannot also modify the decree of the lower court, or direct the entry of an affirmative order in the case. A dismissal of the appeal is a denial of jurisdiction. To direct the lower court to grant leave to sue is the exercise of jurisdiction. The two are inconsistent, and such are the decisions. In

United States v. *Nourse*, 6 Pet., 470,

under a special statute one applied to the District Court for an injunction against the United States. From a decree of the District Court an appeal was prosecuted to the Circuit Court, which entered its final order upon the merits. An appeal was then prosecuted to this court, where the appellee moved to dismiss for want of jurisdiction, and this court reversed the decree of the Circuit Court for want of jurisdiction in that court, saying:

"If it clearly appear, that the circuit court had no jurisdiction in this case, still this court may take jurisdiction, so far as it regards the proceedings had before the circuit court; but those proceedings, being wholly unauthorized, must be annulled or reversed. This court, however, in such case, can take no further jurisdiction of the cause. They cannot remand the cause for further proceedings to the circuit court, because that court has no jurisdiction; and they cannot retain the cause here for further proceedings, because this court can exercise no appellate jurisdiction which

is not given to it by statute." In

Stickney v. *Will*, 23 Wall., 150,

a party filed in the Circuit Court a petition for review under a prior bankrupt statute. The Circuit Court sustained jurisdiction, and the other party then appealed to this court, which held that a petition for revision was not, and that an appeal was, the proper mode of review, and remanded the case to the Circuit Court with directions to dismiss the petition for want of jurisdiction. The facts of the case, therefore, were on all fours with the one at bar. The court said:

"Viewed in the light of these suggestions it is quite clear that the decree of the Circuit Court rendered under the petition of review, must be reversed, and inasmuch as the Circuit Court has no jurisdiction of the subject matter in that form of proceeding, and that it is now too late to take an appeal from the District Court to the Circuit Court, the cause must be remanded with directions to dismiss the petition.

Unable to refer the appellee to any legal remedy as matter of right, under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the District Court will grant a review of the decree rendered in that court, if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the Circuit Court."

If this court could not, in that case, do more than *suggest* to the District Court to review its decision, how can the mandate of this court be construed as ordering that court to authorize the trustee in bankruptcy to institute a new suit?

Mordecai v. *Lindsay*, 19 How., 199,

Montgomery v. *Anderson*, 21 How., 386,

assert the same principle.

We are aware that the action of this court in "directing" a modification of the decree of the District Court may, under this view and these authorities, have been improvident—the subject was not discussed either in the briefs or oral argument in this court. Still that modification or suggestion has been accepted and acted upon by the District Court, and this question is not now material.

We do, however urge that this view justifies the construction, which the District Judge has placed upon the mandate of this court.

The Circuit Court of Appeals by its writ of mandamus placed this trustee in bankruptcy beyond the control of the District Court as respects further litigation of this controversy. If this construction of the mandate was right, the trustee is given by this court the right to continue the litigation, although the District Court may think the case is one to be settled rather than litigated. In construing the mandate in this respect, the extent of this court's jurisdiction in the premises should be considered, and when this is done the construction put by this District Court upon the mandate is the proper one.

The respondents in the *certiorari* were the trustee in bankruptcy and a *general* creditor of the bankrupt. The opinion and mandate of this court directed that the decree of the District Court should be made "without prejudice to the right of the respondents to litigate in any proper court." The decree entered under this mandate by the District Court was without prejudice to the rights of the trustee only, "to litigate in any proper

court the question of the right of said trustee to recover said funds as a part of the bankrupt's general estate, and it is contended that this was a violation of the mandate. But clearly it is not a real or substantial objection, because by the bankrupt statute this cause of action is vested exclusively in the trustee in bankruptcy.

This general creditor was, therefore, not a real or material party to the original cause, and his omission in this modifying clause is not a substantial departure from the mandate.

The Circuit Court of Appeals by its writ of mandamus also compelled the elimination of the finding of possession from the order originally entered by the District Court. But the question of jurisdiction of the District Court depended upon the fact of possession, as the following extract from the opinion of this court shows:

"It was settled [by the Act of 1867] that the bankruptcy court was without jurisdiction to determine adverse claims to property, *not in the possession* of the assignee in bankruptcy, by summary proceeding, whether absolute title or only a lien was asserted." (Citing cases.) "The present act was plainly framed in recognition of the principle of these cases. * * * Nevertheless, the District Court had jurisdiction to determine whether it could or could not proceed further. * * *

In the present case, the receiver filed a petition reciting that he had taken possession of the property. This was denied. The District Court adjudged that the receiver had not at the time of filing its petition the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and *had possession*. Nevertheless

it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale. * * *

In our view the District Court should have declined *upon its findings* to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made."

Thus the question of possession was a fact necessary to be decided by the District Court to determine its jurisdiction, and it was proper to incorporate that finding into its order. This Court nowhere directs the elimination of this finding from the order, but only that the decree (that is, the decretal part) should be without prejudice, etc.

These contentions respecting the proper order to be entered under the decision of this court were fully discussed upon the application to this court for a mandamus, and the denial of that writ, would seem to have involved their decision adversely to this trustee and creditor.

Respectfully submitted.

HENRY S. ROBBINS,
Counsel for Petitioners.

WALLACE HECKMAN,
JAMES G. ELSDON,
Of Counsel.

Office Supreme Court, U. S.
FILED.
MAY 13 1907
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1907.

No. 8 ORIGINAL.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.*

Petition for Mandamus.

Return of the United States Circuit Court of Appeals for the Seventh Circuit, and the Judges thereof, to Rule to Show Cause.

JOSEPH E. PADEN AND
NEWTON WYETH,
COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 19, ORIGINAL.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.* | Petition for Mandamus.

Return of the United States Circuit Court of Appeals for the Seventh Circuit, and the Judges thereof, to Rule to Show Cause.

These respondents, the United States Circuit Court of Appeals for the Seventh Circuit and Peter S. Grosscup, Francis E. Baker and William H. Seaman, the judges thereof, in answer to the order to show cause herein respectfully show as follows:

That the only mandate issued from the Supreme Court in the *certiorari* named in said petition was the mandate directed to the said Circuit Court of Appeals, issued May 15, 1905, and filed by said petitioners and the National Storage Com-

pany in the said appeals in said Circuit Court of Appeals on October 12, 1905, the material and directing particulars of which mandate were as follows:

"Whereas, in the present October term, in the year of Our Lord one thousand nine hundred and four, the said cause came on to be heard before said Supreme Court on the said transcript of record and was argued by counsel.

"On consideration thereof it is now here ordered, adjudged and decreed by this court that the decrees of the said United States Circuit Court of Appeals in this case be and the same are hereby reversed with costs. * * *

"And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court of Appeals with directions to dismiss the appeals, and to remand the cause to the District Court of United States for the Northern District of Illinois for further proceedings in conformity with the opinion of this court.

"You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said writ of *certiorari* notwithstanding."

That, thereupon, on said October 12, 1905, said Circuit Court of Appeals entered an order in each of said appeals, the material part of which is as follows:

"And the court having inspected said mandate,

and being fully advised in the premises on consideration thereof, it is now here further ordered, adjudged and decreed by this court, that the appeal from the United States District Court for the Northern District of Illinois, heretofore taken herein, be and the same is hereby dismissed with costs, in accordance with said mandate, and said cause is remanded to the District Court of United States for the Northern District of Illinois for further proceedings in conformity with the opinion of the Supreme Court of United States, in case No. 139 of the October term, A. D. 1904, of said court."

That thereupon mandates were duly issued by said Circuit Court of Appeals, reciting said order and decree, directed to the District Court of United States for the Northern District of Illinois, and directing said District Court as follows:

"You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

That said mandates were filed in said District Court, as stated in said petition, and an order entered on November 1, 1905, by the District Court as in said petition set forth.

That in mandamus proceedings in said Circuit Court of Appeals thereafter had the court made and filed the following decision and opinion:

"PER CURIAM: This is an application for a writ of mandamus to the judge of the District Court, sitting in bankruptcy, in a proceeding entitled *In re* Alexander Rodgers, Bankrupt, for the modifica-

tion of a decree therein of November 1, 1905, purporting to be entered 'upon the mandate of the United States Circuit Court of Appeals for the Seventh Circuit remanding said cause * * * for further proceedings in conformity with the opinion of the Supreme Court of the United States.' The opinion of the Supreme Court referred to is reported under the title of *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S., 280-288, on *certiorari* to the Circuit Court of Appeals for the Seventh Circuit. The petition sets out the decree as entered, and alleges that it does not conform to the opinion of the Supreme Court, or the mandate issued by this court thereupon.

"We have no doubt the decree of the District Court is not in conformity with the opinion and directions of the Supreme Court. The question whether the jurisdiction of this court extends to the enforcement of such directions by mandamus, under the terms of the mandate of this court, is difficult of solution within the authorities. The inquiry in the present case, however, involves the further fact, stated in the return to the alternative writ, that like application for mandamus was presented by the petitioner to the Supreme Court, and the motion for leave to file such petition was denied without qualification. The supervisory jurisdiction of this court under the Bankruptcy Act (Sec. 24b) is not invoked by the petition, nor can it be exercised in this instance, for want of necessary parties and timely application. Moreover, the petition avers that the statute of limitations will soon run against the petitioner's claims in refer-

ence to which the Supreme Court directed modification of the decree, to provide against 'prejudice to the right of respondents to litigate in a proper court.'

"With the right to such modification unquestionable under the express terms of that opinion and need of speedy relief to preserve any rights of the petitioner, no remedy appears unless the writ of mandamus can issue as sought by this application.

"Upon the decision of the cause by the Supreme Court, on *certiorari* to this court, it was 'remanded to the said Circuit Court of Appeals with directions to dismiss the appeals and to remand the cause to the District Court * * * for further proceedings in conformity with the opinion of this court.' The mandate of this court remanded the cause to the District Court in like terms, without specifying the modifications to be made. Whether the last mentioned mandate was the command of this court, in the sense of the statute and authorities, may not be clear, but the mandate of the Supreme Court is plainly addressed to this court for remand to the District Court to carry out the directions. In view of the form and terms thus adopted by the Supreme Court, together with its denial of leave to file there an application for the writ under the circumstances stated, it is reasonable to assume that the Supreme Court intended and treated the final direction to the District Court as proceeding from this court, under the decision on *certiorari*, with jurisdiction to enforce obedience. Thus considered, the petitioner is entitled to the writ and the alternative writ issued herein is, accordingly, made peremptory."

That said peremptory writ of mandamus issued by said Circuit Court of Appeals, in the mandatory part thereof, was as follows:

"That said proceedings before you, in so entering said finding and order of November 1, 1905, in said proceeding in bankruptcy, as aforesaid, were not in conformity with the said opinion of said Supreme Court as directed by said mandates of said Circuit Court of Appeals, in that said order so entered by you makes a finding that said District Court had jurisdiction to find as, in and by its decree entered on the 29th day of October, A. D. 1902, it did find, that the National Storage Company was at the time of the filing of the petition by the receiver therein, to wit, on May 13, 1901, and also at the time of the filing of the petition in bankruptcy therein, entitled to possession and had possession of the property in question described in said decree of October 29, 1902, but that by reason of such finding of possession in said National Storage Company said District Court was without jurisdiction to proceed to adjudicate upon the rights of said the First National Bank of Chicago and H. W. Rogers and James C. Rogers, doing business as H. W. Rogers & Brother, to payment and satisfaction of their claims out of the proceeds of said property, but that said decree should in that respect and to that extent be modified, whereas such finding and recital, if any, should be that the bankruptcy court is without jurisdiction to determine, by summary proceedings, adverse claims to property, not in possession of the trustee in bankruptcy, and that the said District Court in view of its find-

ings in said decree of October 29, 1902, lacked, and should have declined to retain, jurisdiction to determine on the merits the right and title of the respective parties to the property in question and to decree payment out of the proceeds thereof accordingly; and that the decrees for the return of the money should have been without prejudice to the right of the respondents in said *certiorari* to litigate in a proper court; and in that said order varies and modifies the respective amounts ordered to be retained and to be paid over by said the First National Bank of Chicago from the amounts as ordered in said decree of October 29, 1902; and in that said order limits the parties, as to whom the decree for the return of the money shall be without prejudice, to the said trustee, instead of the respondents in said *certiorari;* and in that the right of said trustee to litigate is conditioned by the provision in said order: if said District Court shall so authorize; whereas such condition should not be made. And that said petitioners, the Chicago Title & Trust Company, trustee of Alexander Rogers, Bankrupt, and James A. Patten, are without adequate remedy in the premises, unless it be afforded by the interposition of the said Circuit Court of Appeals by the writ of mandamus.

"Which matters aforesaid we have adjudged to be true.

"Now, therefore, said United States Circuit Court of Appeals for the Seventh Circuit, being willing that full and speedy justice should be done in the premises, does hereby command you, Solomon H. Bethea, as a judge of the District Court of the

United States for the Northern District of Illinois, that you do, immediately upon the receipt of this writ, vacate and set aside the said finding and order so entered by you in the said proceeding in bankruptcy on the 1st day of November, A. D. 1905, and in lieu thereof that you enter, or cause to be entered, in conformity with the said opinion of the Supreme Court of the United States in case No. 139 of the October term, A. D. 1904, of said Supreme Court, as directed by said mandates of the United States Circuit Court of Appeals for the Seventh Circuit, an order so modifying the order, judgment and decree entered in said proceedings in bankruptcy on the 29th day of October, A. D. 1902, as that the said order, judgment and decree shall, in the respects that the same orders, adjudges and decrees the return of the proceeds of the sale of property as described therein, namely, that said the First National Bank of Chicago retain a certain sum of money from said proceeds and pay over the balance thereof to other parties as directed therein, be held and taken to be without prejudice, by reason of any of the proceedings in said bankruptcy cause, to the right of the Chicago Title & Trust Company, trustee of Alexander Rodgers, Bankrupt, James A. Patten, the National Storage Company, Frank E. Winans, and E. W. Bailey & Co., and any of them, to litigate in a proper court or courts upon the merits, their right, title or interest, or that of any of them, in and to the said property represented by the said proceeds of sale, named in said decree of October 29, A. D. 1902, so that complaint be not again made to said Circuit Court of Appeals."

And these respondents authorize counsel for defendants in error in the First National Bank of Chicago and H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, plaintiffs in error, *vs.* The Chicago Title & Trust Company, Trustee of Alexander Rodgers, Bankrupt, and James A. Patten, being cause No. 301 of the October term, A. D. 1906, on the docket of the Supreme Court, to appear for them, and to present the legal effect of the petition and return in this proceeding upon the rights of their clients in said cause No. 301.

Wherefore, these respondents pray the judgment of the court here, whether the petitioners ought to have a writ of mandamus in this behalf; and that the rule to show cause may be discharged and these respondents may be hence dismissed with their costs, etc.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,

By PETER S. GROSSCUP,
Presiding Judge.

PETER S. GROSSCUP,
FRANCIS E. BAKER,
WILLIAM H. SEAMAN,
Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel in this behalf for the above Respondents and for The Chicago Title & Trust Company, Trustee, and James A. Patten.

Office Supreme Court, U. S.
FILED
MAY 13 1907
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906.

No. 8 ORIGINAL.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS AND JAMES O. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.*

Petition for Mandamus.

Brief in behalf of the United States Circuit Court of Appeals for the Seventh Circuit, and the Judges thereof.

NEWTON WYETH AND
JOSEPH E. PADEN,
COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906

No. 19, Original.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners.* | Petition for Mandamus

Brief in behalf of the United States Circuit Court of Appeals for the Seventh Circuit, and the Judges Thereof.

Briefly, but substantially stated, this petition for mandamus reaches this court under the following circumstances:

In a proceeding in the District Court of the United States for the Northern District of Illinois, in a cause in bankruptcy, entitled *In re* Alexander Rodgers, Bankrupt, No. 5810, a decree was entered October 29, 1902, wherein the court finds that the receiver (trustee) in the case had not, at the time of the beginning of the proceedings, the right of possession of certain property involved, but that the National Storage Company was at the time entitled to possession, and had possession of said property, and it was ordered that the proceeds of

the property (it having been sold under the order of the court by consent of parties and placed in the hands of the First National Bank of Chicago) be paid over to the bank, Rogers & Brother and the National Storage Company.

From this decree the trustee in bankruptcy and James A. Patten, a creditor, took appeals to the Circuit Court of Appeals for the Seventh Circuit, where a decree was entered reversing the District Court and remanding the cause to that court with directions to decree for the trustee.

Thus far these decrees treated the proceedings as a plenary suit between adverse parties, on the merits. But, the First National Bank, Rogers & Brother and the Storage Company having, at one stage in the proceedings in the District Court, objected to the jurisdiction of that court to proceed, the bank and Rogers & Brother sued out *certiorari* from this court as to want of jurisdiction of the Circuit Court of Appeals to entertain the appeals, and this court adjudged that the proceedings in the District Court must, in view of the objections that had been made in that court, be considered as a proceeding in bankruptcy, of a preliminary and summary nature by the District Court in determining its jurisdiction, and that on its findings in the decree of October, 1902, the District Court should have declined to proceed to adjudicate on the merits; in other words, that the decree in the District Court was and must be held and taken to be a dismissal for want of jurisdiction, and that such dismissal should have been without prejudice to the right of the respondents in the *certiorari* to

sue in a proper court. This court further held that the Circuit Court of Appeals did not have jurisdiction to entertain the appeals, and decreed that it should dismiss the appeals and remand the causes to the District Court for further proceedings in accordance with the opinion of this court.

Up to this point the situation and effect of what was done is clear and unquestioned.

But, notwithstanding the *certiorari* brought into this court the question only of the jurisdiction of the Court of Appeals in the matter of the appeals, in a case of the character aforesaid, this court held in its opinion that the decree of October 29, 1902, should have been without prejudice to the right of the respondents in the *certiorari* to sue in a proper court, and the opinion directed that such modification should be made. This decision and opinion is found in the *First National Bank of Chicago* v. *Chicago Title & Trust Co., Trustee*, 198 U. S., 280.

This decision having been reached, the petitioners here procured, in due course, a mandate from this court to the Circuit Court of Appeals, and caused the same to be filed in the latter court on October 12, 1905, whereupon the Court of Appeals, in compliance, entered orders dismissing the appeals and remanding the causes to the District Court for further proceedings in accordance with the opinion of this court. The material parts of said mandate from this court to the Circuit Court of Appeals were:

> "It is now here ordered, adjudged and decreed by this court that the decrees of the said United States Circuit Court of Appeals in this

cause be, and the same are hereby, reversed; and it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court of Appeals with directions to dismiss the appeals and to remand the cause to the District Court of the United States for the Northern District of Illinois for further proceedings in conformity with the opinion of this court.

"You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding."

The situation then was the same as if the Circuit Court of Appeals in the first instance had correctly conceived the decree of October 29, 1902, and had dismissed the appeals with like direction on its part. There were, in fact, decrees of dismissal by the Court of Appeals, with a mandate and direction to the District Court.

Upon the filing of the mandates from the Circuit Court of Appeals in the District Court, that court, while by recitals in its order of modification purporting to make the modification pursuant to the mandates and in accordance with the opinion of the Supreme Court as directed, undertook to make a new set of findings, and as to the clause "without prejudice," entered the same, not as directed, but modified and limited by making the same without prejudice to the rights of the trustee, if that court should so authorize, to litigate in a proper court.

Conceiving the condition thus placed upon the clause of "without prejudice" to be unwarranted by anything contained in the mandates and the opinion of this court referred to therein, the trustee and James A. Patten, a creditor, and respondents in said *certiorari*, objected and endeavored to have the court strike out said condition, which the court refused to do. Being then in some doubt as to the proper court to which to apply, they presented to this court a motion for leave to file a petition for mandamus, and said motion was denied. Thereupon they applied to the Circuit Court of Appeals, and a mandamus was awarded, and writ was issued. District Judge Bethea, declining to sue out writ of error, this writ of mandamus was served upon him, and he promptly complied therewith by striking out the order of November 1, 1905, and inserted an order in simple form, making a modification of the decree of October 29, 1902, substantially in the very language of the opinion of this court.

I.

The decrees of dismissal with directions of the Circuit Court of Appeals were actual decrees of that court, to be carried out and enforced.

The Circuit Court of Appeals rightfully issued mandates to the District Court, and was bound by mandamus to compel compliance. The mandamus was in aid of its appellate jurisdiction.

Counsel for The Chicago Title & Trust Company, Trustee, and James A. Patten, who are the defendants in error in No. 301 of the October term, 1906,

of this court, and who appear to present this brief and argument in support of the return of the judges of the Circuit Court of Appeals to the rule to show cause, and in opposition to the granting of a writ of mandamus, make no question that it is the province of the Supreme Court to construe its own opinions, decrees and mandates, and enforce the same. But they submit that, in this case where no mandate was issued from the Supreme Court to the District Court, and the only mandate from this court was directed to the Circuit Court of Appeals, the decrees of dismissal and remanding orders entered in the Circuit Court of Appeals were actual decrees of that court, and we take it that that was the view of this court in denying our motion for leave to file petition for mandamus in this court.

This was the view taken by the Circuit Court of Appeals, as shown in its opinion in the mandamus proceedings therein, which appears under the title, *Ex Parte The Chicago Title & Trust Co., Trustee,* in 146 Fed. Rep., 742. The Court of Appeals there say:

> "Upon the decision of the cause by the Supreme Court, on *certiorari* to this court, it was 'remanded to the said Circuit Court of Appeals with directions to dismiss the appeals and to remand the cause to the District Court * * * for further proceedings in conformity with the opinion of this court.' The mandate of this court remanded the cause to the District Court in like terms, without specifying the modifications to be made. Whether the last mentioned mandate was the command of this court, in the sense of the statute and authorities, may not be clear, but the mandate of

> the Supreme Court is plainly addressed to this court for remand to the District Court to carry out the directions. In view of the form and terms thus adopted by the Supreme Court, together with its denial of leave to file there an application for the writ under the circumstances stated, it is reasonable to assume that the Supreme Court intended and treated the final direction to the District Court as proceeding from this court, under the decision on *certiorari*, with jurisdiction to enforce obedience."

The Circuit Court of Appeals sent, and was bound to send, mandates to the District Court. The Circuit Court of Appeals by the writ of mandamus simply sent down a more specific mandate to the District Court.

The decrees of dismissal and direction entered by the Court of Appeals were actual decrees, as much so as if no *certiorari* had arisen and they had been entered as the original decrees and orders of the Court of Appeals, had that court in the first instance conceived that the objections of the petitioners in the District Court to the jurisdiction of the District Court to proceed on the merits were well taken and had not been waived. The decrees of dismissal in the Court of Appeals and remand of the causes were not mere forms, and that court was not a mere instrument, and that court had power which it could rightfully exercise over the decrees to carry them into execution.

No question of concurrent jurisdiction of the Court of Appeals to construe the opinion of the Supreme Court, in the sense in which the same is urged by the petitioners, is involved. If, in enter-

ing its decrees, the Court of Appeals commits error, and the same is reviewable, there are proper methods of review.

The Circuit Court of Appeals, having entered the decrees and issued the mandates, was not to remain inert, but was to see that the mandates issued by that court, and issued by no other, were complied with. Any writs of mandamus or more specific mandates would be in aid of its appellate jurisdiction.

It cannot be denied that the Circuit Court of Appeals acquired jurisdiction by appropriate proceedings to issue its mandates with directions, and the entry of the orders by that court remanding with directions was the exercise of appellate jurisdiction, perforce of which, upon its mandates being issued, it is empowered under the statutes to enforce compliance by a mandamus. If the District Court had failed to take any action whatever upon the filing of the mandates in that court, it would have been the duty of the Court of Appeals to issue a mandamus to compel action, and so when the District Court failed to comply with the mandates, a mandamus would issue for the same reasons; and as long as the decrees of dismissal and remanding by the Court of Appeals stood, not set aside by any direct proceeding, the lower court could not question the jurisdiction of the Court of Appeals. As has been said, the Supreme Court in this case had by its own decree and mandate reposed the whole matter in the Circuit Court of Appeals, and the orders and directions of the latter court were accordingly to be observed by the District Court.

While the mere denial of a motion for leave to file a petition in one court cannot be looked upon as *res adjudicata* in another court, and there appear to be other reasons why the Supreme Court denied such motion when presented to it which would make the order of denial not *res adjudicata* in another court, any question of *res adjudicata* arising on denial of such motion does not appear to be in point in the present proceeding for mandamus in this court. If the Circuit Court of Appeals had either exclusive jurisdiction or concurrent jurisdiction to entertain the petition for mandamus there presented, the matter of *res adjudicata* is immaterial after that court has acted.

II.

The modification originally made in the District Court was not a compliance. The modification as finally made was a compliance. Petitioners show that the matters of which they complain in the modifications made are immaterial, and that they have been deprived of nothing to which they were entitled under the decrees and mandates of the Circuit Court of Appeals, and the opinion of the Supreme Court.

Under head V in their printed brief herein, petitioners contend that a proper order of modification has not been entered in the District Court. The general assumption in their brief is that they have been deprived of some right, and this is pointed out to be the striking out of the conditional phrase "if this court shall so authorize," where the same was introduced in the original modifica-

tion of "without prejudice." Nothing else material is mentioned or pointed out as a real subject-matter of complaint as respects the modification of the original decree, except there is thrown in an assumption that the Circuit Court of Appeals gave the District Court directions to enter an order for leave to sue, which assumption is wholly unfounded Neither this court nor the Court of Appeals ever said or did anything on that subject. It was the District Court alone that undertook, as if directed by the mandates and in accordance with the opinion of this court referred to in the mandates, to enter not simply a modification of "without prejudice to sue," but to enter such additional modification above referred to.

Petitioners now contend in their brief as they did in their printed briefs in opposition to the motion of said trustee and Patten presented to this court for leave to file petition for mandamus, and in opposition to a like petition of the same parties presented to the Circuit Court of Appeals, that the introduction of the clause, *if this court shall so authorize*, was the principal point of contention. They still say that "counsel (referring to counsel for these parties) contend that the insertion of the words italicized above constitutes a failure to comply with the mandate."

It plainly appears that no one asked leave of the District Court for leave to sue, and no mandate or opinion anywhere in this litigation contained anything upon the subject of granting leave to sue.

Thus, at the threshhold, petitioners show that in this respect the mandates and opinion of the

Supreme Court gave them nothing of which they have been deprived.

As to the construction to be placed upon the decision of this court, we maintain that this court (to use the language of petitioner) "intended only to limit the force and effect of the decree, in case another suit involving the merits should be instituted in a proper tribunal, that is, to change the decree from one adjudging the merits to one based upon a want of jurisdiction." It is very true that "it is one thing to direct in a mandate the insertion in a decree below of a limitation upon its force and effect in subsequent litigation, and quite a different thing to direct the District Court to grant leave to its trustee to embark upon new and important litigation."

Neither this court nor the Circuit Court of Appeals would be expected to give any direction whatever on this subject, and neither of these courts did give any such direction. Had this court or the Court of Appeals given any direction to the District Court to insert in the modification such a limiting phrase, then the court would have entered upon "quite a different thing" than to direct the "insertion in the decree of a limitation upon its force in subsequent litigation." The court would have then entered upon the matter of giving directions about bringing suits, and assumed jurisdiction thereof.

Petitioners continue the argument by saying that whether the trustee shall litigate is a matter in the discretion of the District Court sitting as a court of bankruptcy, and in fact urge that

the exclusive jurisdiction over that subject is in the District Court, and cite certain sections of the Bankruptcy Act in support of their contention. Thus they maintain that this limiting phrase, "if the court shall so authorize," was a matter that was in no way involved in the *certiorari*, and as we have seen, nothing was said or attempted to be said upon the subject in those proceedings.

While the question whether the District Court in bankruptcy has a right to grant or deny leave to a trustee to bring a plenary suit is probably immaterial in any question now presented to this court, we only suggest that the right or obligation resting upon the trustee to bring such suits is a question to be passed upon by the creditors, whose claims have been allowed, under Sections 55e, 56a, 12a and b, and other provisions of the Bankruptcy Act; and above all, it is not for parties adverse to the bankrupt estate, and who are not creditors entitled to vote, to contend for the entry of an order by the District Court limiting the right of the trustee to sue. Such order of modification as was originally entered purported to be by force of the mandates, and was in such shape and form as to tie up the trustee and creditors and preclude them from bringing independent or plenary suits of their own motion. If the creditors and trustee must apply to the District Court for leave to bring a plenary suit, that court could in effect determine the controversy upon motion, although not having jurisdiction to try the merits.

Petitioners further argue that the general creditor and respondents in the *certiorari*, other than

the trustee, were not material parties to the original cause, and that their omission in the modifying clause as first entered by the District Court was not a substantial departure from the mandates. Therefore, if the trustee is the only party entitled to sue, the insertion with respect to these other parties in the order of April 27, 1906, was no harm and no substantial departure.

Petitioners cite *U. S.* v. *Nourse*, 6 Pet., 470, and *Stickney* v. *Wilt*, 23 Wall., 150, to show that where an appeal or petition for review is erroneously prosecuted from the District Court to the Court of Appeals, the latter court, being without jurisdiction, can only dismiss; and that, if it decree otherwise, and the cause is brought before this court for review, the question of jurisdiction alone comes up, and this court can but reverse the Court of Appeals and direct dismissal, and that this court can grant no other relief, and therefore, this court was without jurisdiction to direct the amending of the decree of October 29, 1902, by making the same "without prejudice."

If, as suggested by petitioners' brief, "the action of this court in 'directing' a modification of the decree" was "improvident," the pertinent question is, will this court take any further notice of this matter, and especially, will it by the extraordinary writ of mandamus compel a reversal of these proceedings below in order to direct the District Court to comply (if it has not already complied) by entering a modification which this court had no jurisdiction to direct? The petitioners have raised this question, and not the respondents.

No doubt, this court had jurisdiction to determine, as it must have deetrmined (in view of the objections originally raised to the jurisdiction of the District Court, which this court held were not waived), that the decree of October 29, 1902, was a dismissal for want of jurisdiction in the District Court to determine the controversy presented, and that said decree must be so treated. "Still," say counsel in their brief, "that modification or suggestion" (that the District Court modify the original decree by making the same without prejudice) "has been accepted and acted upon by the District Court, and this question is not now material."

But it is material. We take it that this court will not, by mandamus or otherwise, direct the District Court to set aside a modification, and direct the entry of another, which the petitioners argue this court had no power to enter and enforce.

Again, the argument in petitioners' brief is that the Circuit Court of Appeals by its writ of mandamus has placed the trustee beyond the control of the District Court, as respects further litigation of this controversy. Not so. The Court of Appeals determined only that the entry of a limiting phrase as to bringing suits should not be entered as made *pursuant to the mandates*. If, as contended by petitioners, the right of trustee to bring suits is to be decided by the District Court, such matter can come up before the District Court in proper form, but is in nowise in this proceeding.

Finally, under this branch of the argument, petitioners allege that the Circuit Court of Appeals by its writ of mandamus compelled the elimination of

the findings as to possession in the order originally entered in the District Court. This appears to be a gross misconception of the fact. The original decree of October 29, 1902, with all of its recitals as to possession, is left unchanged and a simple modifying clause of "without prejudice" has been inserted.

The District Court certainly was not required to write up any new findings as to facts in its order of modification, and we maintain that the District Court in the order of November 1, 1905, did enter new findings with regard to the possession of the property involved, which were prejudicial to the trustee, and in said order in effect found that such new findings were directed by this court. We also maintain that the proper construction of the opinion of this court is that this court treated and construed the finding of October 29, 1902, as to the possession of the property, as one made by the District Court in a proceeding in the nature of a preliminary inquiry as to jurisdiction, and we maintain that in the modifying order no findings should have been made which purport to have the effect of a final adjudication as to the matters connected with such preliminary inquiry.

We, therefore, respectfully submit that the rule to show cause should be discharged, etc.

Respectfully,

NEWTON WYETH and
JOSEPH E. PADEN,

Counsel in this behalf for the United States Circuit Court of Appeals for the Seventh Circuit, and the Judges thereof.